

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

IN RE: Bard IVC Filters Products)
Liability Litigation,) MD 15-02641-PHX-DGC
)
_____))
)
Lisa Hyde and Mark Hyde, a married) Phoenix, Arizona
couple,) October 5, 2018
)
Plaintiffs,)
)
v.) CV 16-00893-PHX-DGC
)
C.R. Bard, Inc., a New Jersey)
corporation, and Bard Peripheral)
Vascular, an Arizona corporation,)
)
Defendants.)
_____)

BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TRIAL DAY 14 (Verdict)

Official Court Reporter:
Patricia Lyons, RMR, CRR
Sandra Day O'Connor U.S. Courthouse, Ste. 312
401 West Washington Street, SPC 41
Phoenix, Arizona 85003-2150
(602) 322-7257

Proceedings Reported by Stenographic Court Reporter
Transcript Prepared with Computer-Aided Transcription

A P P E A R A N C E S

For the Plaintiffs:

Lopez McHugh
By: **RAMON R. LOPEZ**, ESQ.
100 Bayview Circle, Suite 5600
Newport Beach, CA 92660

Gallagher & Kennedy
By: **MARK S. O'CONNOR**, ESQ.
By: **PAUL L. STOLLER**, ESQ.
2575 East Camelback Road, Suite 1100
Phoenix, AZ 85016

Heaviside Reed Zaic
By: **JULIA REED ZAIC**, ESQ.
By: **LAURA E. SMITH**, ESQ.
312 Broadway, Ste. 203
Laguna Beach, CA 92651

Goldenberg Law PLLC
By: **STUART GOLDENBERG**, ESQ.
By: **MARLENE GOLDENBERG**, ESQ.
800 LaSalle Ave., Ste. 2150
Minneapolis, MN 55402

Lopez McHugh, LLP
By: **JOSHUA MANKOFF**, ESQ.
1 International Plaza, #550
PMB-059
Philadelphia, PA 19113

For the Defendants:

Nelson Mullins Riley & Scarborough.
BY: **JAMES F. ROGERS**, ESQ.
1320 Main St.
Columbia, SC 29201

Snell & Wilmer
By: **JAMES R. CONDO**, ESQ.
400 East Van Buren
Phoenix, AZ 85004

A P P E A R A N C E S (CONTINUED)

For the Defendants:

Nelson Mullins Riley & Scarborough
By: **RICHARD B. NORTH, JR.**, ESQ.
By: **MATTHEW B. LERNER**, ESQ.
By: **ELIZABETH C. HELM**, ESQ.
201 17th Street NW, Suite 1700
Atlanta, GA 30363

C.R Bard, Inc.
Associate General Counsel, Litigation
By: **CANDACE CAMARATA**, ESQ.
730 Central Avenue
Murray Hill, New Jersey 07974

P R O C E E D I N G S

(Proceedings resumed in open court outside the presence of the jury.)

THE COURT: Please be seated.

Mr. Stoller, you requested we get together this morning. Why don't you share with me your thoughts on what the issue is.

MR. STOLLER: Yes, Your Honor. Thank you, Your Honor.

Particularly the defense has raised objections to our presentation of evidence in the punitive phase, if we get there. I thought we'd all be better served if we address these issues now rather than wait until the jury comes back.

I'll let them speak specifically to them, but we have submitted to them, Your Honor, video run of Mr. Syed. You'll recall from the Booker trial that was the video we played in the punitive damage phase of that case that related to effectively the net worth of Bard, the income it made over the relevant period of time, shareholders' equity in the company, and those similar types of financial information.

We gave over our intended run to the other side for that, got back a statement that they objected to all of it on two grounds, one of which has to do with time issue, which I'll let Mr. Lopez address with you. But the other one, I'd

10:00:34 1 like to deal with the substantive issue, if I can, which, as
2 I understand it, is their *State Farm, Gore* objection to it
3 contending this has to do with the general financial
4 condition of the company and its operations and not -- is not
10:00:48 5 limited to sales of this particular device in the particular
6 state at issue, Wisconsin.

7 I believe Your Honor addressed this at the last
8 hearing --

9 THE COURT: Let me interrupt you, Mr. Stoller. It
10 might be best for me to hear the objection first and then
11 your response to it.

12 MR. STOLLER: I'm fine with that, Your Honor.

13 THE COURT: Let's go ahead and hear what the
14 defendants have to say and then I'll hear from plaintiffs.

10:01:10 15 MR. ROGERS: Your Honor, do you want to hear about
16 both issues?

17 THE COURT: Yes.

18 MR. ROGERS: Okay. First, the first one is simple
19 and that's the time issue. When we had our last sidebar, I
10:01:21 20 understood Your Honor to say the plaintiffs had 15 minutes
21 left. That was before Mr. O'Connor's rebuttal, which by my
22 time ran about 13 or 14 minutes. And the video run we've
23 been given has nine minutes for the plaintiff, and I also
24 gather they're planning on also making another argument to
10:01:42 25 the jury.

10:01:44 1 So I think, Your Honor, just they're out of time and
2 that's the basic objection on that issue.

3 THE COURT: All right.

4 MS. HELM: Do you want to hear the substantive --
10:01:55 5 may I approach the podium, Your Honor?

6 THE COURT: Yes, you may.

7 Your Honor, in addition to the video run, the
8 plaintiffs have provided us with four, I assume
9 demonstratives that relate to net profits of C.R. Bard from
10:02:26 10 2012 through 2017. Some of them are limited to 2016 and
11 2017. And also officer compensation for 2014 to 2016.

12 None of these slides and none of the testimony that
13 they have designated relate to the percentage of sales or
14 profits for IVC filters or relate to the percentage of sales
10:02:58 15 or profits for sales in the state of Wisconsin.

16 And in *State Farm*, the supreme court held that a
17 defendant should be punished for the conduct that harmed the
18 plaintiff, not for being an unsavory individual or business.
19 That's 538 U.S. at 422 and 423. And in *BMW versus Gore* the
10:03:23 20 Supreme Court held punitive damages based on conduct
21 unrelated to the plaintiffs' harm enters the zone of
22 arbitrariness that violates due process. And that's 517 U.S.
23 at 568.

24 Your Honor, we have objections for two reasons.
10:03:42 25 One, Bard, C.R. Bard, is a company that makes many, many,

10:03:47 1 many products. By putting forth the net profits of C.R. Bard
2 there's no way for the jury to determine what of those
3 profits relate to the alleged harm to Ms. Hyde because it's
4 not broken down by product. You can't tell in here what part
10:04:04 5 of the profits occurred because of IVC filters.

6 It also allows the jury to punish Bard and BPV for
7 conduct outside the state of Wisconsin. And the Ninth
8 Circuit following *Gore* in *White versus Ford Motor Company* at
9 312 F.3d 998 held that punitive damages must -- it's a -- the
10:04:33 10 parties are prohibited and the jury's prohibited from
11 imposing punitive damages outside the legitimate interests of
12 the state. In that state it was the state of Nevada.

13 And interestingly, in *White versus Ford*, the
14 plaintiffs presented national sales data. So they presented
10:04:52 15 nationwide data and the jury awarded punitives based on
16 nationwide data.

17 I would ask for a limiting instruction because there
18 is some case law that says overall profits go to
19 reprehensibility, but they can't be used to determine
10:05:11 20 punitive damages, but there is no evidence to cure the issue.
21 So you can -- you can give a curative instruction that says
22 while you can consider profits for reprehensibility, you have
23 to address what happened in Wisconsin and what happened with
24 IVC filters, but there's been no evidence presented and none
10:05:29 25 provided to us to allow the jury to make that determination.

10:05:33 1 So I don't see how a curative instruction or
2 limiting instruction that's been done by a number of other
3 courts would be available in this case because there's no
4 evidence available for the jury to make that determination.

10:05:47 5 So what we're left with in this testimony -- in the
6 testimony and in the demonstrative exhibits, is evidence that
7 would give the jury the ability and probably maybe the
8 incentive to punish both BPV and C.R. Bard for acts unrelated
9 to the filter and outside the state of Wisconsin.

10:06:14 10 THE COURT: Okay. Thank you.

11 Just one second, counsel.

12 (The Court and the judicial assistant confer.)

13 THE COURT: Nancy tells me we have a verdict; the
14 jury just called. Let's go ahead --

10:06:31 15 Nancy will you tell them it will be a few minutes
16 before -- you told them that. Okay.

17 Go ahead Mr. Stoller.

18 MR. STOLLER: I'll be quick and we'll do this in
19 reverse order. I'll address the constitutional argument and
20 say we addressed this in the jury instructions phase in the
21 Jones trial where the defense made the same argument and
22 wanted inclusion in the instruction in the Jones case on
23 punitive damages that this type of information must be noted
24 to financial -- the sale and marketing of filters in Georgia.
10:07:02 25 And we noted then that the Georgia punitive damages

10:07:06 1 instruction, like the punitive damage instruction here, had
2 as one of the elements the net worth of the company as
3 something the jury could consider in the award of punitive
4 damages.

10:07:17 5 THE COURT: Hold on just a minute, Mr. Stoller.

6 To follow your argument fully, I just want to look
7 at that instruction on punitive damages. That's Instruction
8 A?

9 MR. STOLLER: Instruction A, Your Honor.

10:07:35 10 I'm going to start -- before we get to the
11 instruction, Your Honor, I'm going to start with the punitive
12 damage statute in Wisconsin which is 895.043. And under 4,
13 Procedure, it says "If the plaintiff establishes a prima
14 facie case for the allowance of punitive damages, A, the
10:07:54 15 plaintiff may introduce evidence of the wealth of a
16 defendant."

17 It's the intention of the legislature to go to the
18 issues we're going to talk about here. And, in fact, in the
19 jury instruction you've given to this jury, the charge
10:08:07 20 includes Item Number 7, the financial condition of the
21 manufacturer and the probable effect on the manufacturer of a
22 particular product.

23 When we addressed these issues in the jury
24 instructions in Jones, you noted, Your Honor, you anticipated
10:08:22 25 that if we were going to argue in Jones like we had in Booker

10:08:25 1 that we had to get their attention that this was not about
2 disgorgement but about having a judgment that was of
3 sufficient size to in fact be punitive to draw the attention
4 of the boardroom, as we had argued in Booker, that you
10:08:43 5 thought that was appropriate. For that reason, you thought
6 it was inappropriate to include the limiting language they
7 wanted in the instruction in that case with limiting it to
8 Georgia. And that's what you did there.

9 And I suggest, Your Honor, we're dealing with the
10:08:55 10 same issue here.

11 The cases *Gore* and *State Farm* don't address this
12 issue. They don't address the question of if you're hitting
13 somebody based on their net worth. They're disgorgement
14 issues. And they're also more limited about the facts and on
10:09:12 15 what basis can you award punitive damages.

16 Here -- let me step back for a second.

17 *State Farm* and *Gore* don't stand for the proposition
18 that the jury has to blindly put blinders on and can only
19 look at conduct and financial information within the corners
10:09:30 20 of the border of the state. In fact, what it says is you
21 can't go outside the state if it's unrelated.

22 But here we've almost -- I won't say almost all.
23 Significant conduct that would support an award of punitive
24 damages occurred outside Wisconsin. And I can't -- one of
10:09:47 25 the fears I have for the limiting instruction that Ms. Helm

10:09:51 1 proposes is I think it would improperly limit the jury.

2 Decisions about how this device was going to be designed were
3 made outside of Wisconsin. Decisions about how this device
4 was going to be aggressively marketed were made outside of
10:10:07 5 Wisconsin. Decisions about what information was going to be
6 shared with the public were made outside of Wisconsin.

7 If we had a jury instruction that limited them to
8 looking at the sales of IVC filters in Wisconsin, we would
9 effectively be telling the jury to ignore what is essentially
10:10:26 10 the bad conduct in this case that would form the basis for
11 the punitive damage decision in the first instance.

12 On a monetary basis we're not going to argue
13 disgorgement. We're going to argue, as we did in Booker,
14 that under Item 7 of Instruction A the jury should look at
10:10:41 15 the net worth of the company, its wealth, how much money does
16 it have, what is it going to take to get their attention and
17 what size of judgment would this jury need to render in order
18 to deliver that message.

19 THE COURT: Okay.

10:10:56 20 MR. STOLLER: I'll let Mr. Lopez address the timing
21 issue.

22 MR. LOPEZ: I know we face this issue every trial.
23 This, now our third bellwether trial, when you see the time
24 as distributed between the two parties, the defense always
10:11:21 25 has time left over and we're always struggling for more time.

10:11:24 1 And my argument went ten minutes longer than I thought, than
2 I planned. You get in that moment and you're trying to do
3 the best job you can for your client and I look up and I've
4 gone over what I planned to do to leave us 15 minutes for the
10:11:44 5 punitive damage phase.

6 I thought Mr. O'Connor needed to spend the time he
7 spent on rebuttal. And he will admit he went three or four
8 minutes longer than he had planned.

9 Again, this is a bellwether process and we're trying
10 to figure out where these cases might go if both sides are
11 allowed to try the full case. I mean, I -- that's really the
12 only comments I have other than the fact that we tried, as we
13 have three cases in a row, to fit our case within the time
14 budgeted. And we failed to do that here.

10:12:25 15 Now, I can't do -- I can't make this proposal on
16 behalf of Ms. Murkey because she's not my client, but I feel
17 confident that I can borrow 15 minutes from the Tinlin case.
18 and give it to this case.

19 This is a bellwether process. These people are in
10:12:52 20 it together. Not only are they in it together as five
21 bellwether cases but they're in it for 4,000 other people.
22 I've looked at that case and knowing it's just a Recovery
23 case, we should not have the time issues that we've had.

24 Keep in mind we had to try not just Simon Nitinol,
10:13:07 25 Recovery, G2, G2X, we didn't even know -- there's an issue

10:13:12 1 whether or not this is an Eclipse case or G2X case, so that
2 took us some extra time.

3 I think that we can -- if we can have 15 minutes
4 from the Tinlin case, allow us to have it here, and just know
10:13:27 5 in good faith we tried to squeeze this case into the time and
6 the extra time -- at least time they were able to call
7 Dr. Betensky and Dr. Parisian, but we did have one other
8 expert we didn't call, Dr. Kinney.

9 So I'm making an interest of -- in the interest of
10:13:43 10 justice and in the interest of the bellwether process plea to
11 the Court to allow us 15 minutes total to argue the punitive
12 phase of the case.

13 THE COURT: Okay.

14 I think what we ought to do is get the verdict.
10:14:00 15 That will tell us whether or not these issues need to be
16 decided.

17 If they do, then what I want to do is talk in a bit
18 more detail about the demonstratives you mention. I
19 obviously haven't seen them. I want to go back, which
10:14:13 20 shouldn't take long, and revisit what I decided in the
21 previous cases.

22 So what we'll do is bring in the jury now. If
23 punitives become necessary, I'll explain to them that we need
24 a bit of time to get ready for that phase and excuse them
10:14:28 25 again and we can finish our discussion on these issues.

10:14:32 1 MR. STOLLER: Your Honor, I'll give Traci copies of
2 the demonstratives so you have them.

3 THE COURT: Okay.

4 (The jury entered the courtroom at 10:16.)

10:18:47 5 THE COURT: Please be seated.

6 Good morning, ladies and gentlemen.

7 JURORS: Good morning.

8 THE COURT: Juror Number 6, you've got the red
9 folder. Does that mean you're the chairperson?

10:18:58 10 PROSPECTIVE JUROR: Yes.

11 THE COURT: Would you please hand the verdict form
12 to Nancy.

13 I'm going to ask Traci to read the verdict.

14 THE COURTROOM DEPUTY: Omitting the formal caption,
10:19:43 15 We the jury duly empaneled and sworn in the above-entitled
16 action upon our oaths find as follows:

17 A, liability. Number 1. Do you find by the greater
18 weight of the evidence to a reasonable certainty that Bard is
19 liable to Mrs. Hyde on the strict product liability design
10:20:05 20 defect claim?

21 No.

22 Number 2. Do you find by the greater weight of the
23 evidence to a reasonable certainty that Bard is liable to
24 Mrs. Hyde on the negligent design claim?

10:20:19 25 No.

1 Signed by foreperson Juror Number 6, dated
2 October 5th, 2018.

3 THE COURT: Traci, would you please poll the jury.

4 THE COURTROOM DEPUTY: Juror Number 1 are these your
5 verdicts?

6 JUROR: Yes, they are.

7 THE COURTROOM DEPUTY: Juror Number 2, are these
8 your verdicts?

9 JUROR: Yes, it is.

10 THE COURTROOM DEPUTY: Juror Number 3, are these
11 your verdicts?

12 JUROR: Yes.

13 THE COURTROOM DEPUTY: Juror Number 4, are these
14 your verdicts?

15 JUROR: (Nods head.)

16 THE COURTROOM DEPUTY: Juror Number 5, are these
17 your verdicts?

18 JUROR: Yes.

19 THE COURTROOM DEPUTY: Juror Number 6, are these
20 your verdicts?

21 JUROR: Yes.

22 THE COURTROOM DEPUTY: Juror Number 7, are these
23 your verdicts?

24 JUROR: Yes.

25 THE COURTROOM DEPUTY: Juror Number 8, are these

10:20:52 1 your verdicts?

2 JUROR: Yes.

3 THE COURTROOM DEPUTY: Juror Number 9, are these
4 your verdicts.

10:20:58 5 JUROR: Yes.

6 THE COURT: Juror Number 4, you nodded your head.
7 Did you say yes?

8 JUROR: I did.

9 THE COURT: And Juror Number 9?

10:21:04 10 JUROR: Yes.

11 THE COURT: I just couldn't hear. We need to make
12 sure we've got it on the record.

13 All right. The polling shows that the verdict is
14 unanimous.

10:21:10 15 Ladies and gentlemen, thank you for the time and
16 attention you've devoted to this case. We know it's been an
17 inconvenience for you, but it's been a very important part of
18 our judicial process and we appreciate all the attention
19 you've paid.

10:21:24 20 If you don't mind waiting in the jury room for a
21 minute, I'd like to come back and thank you personally.

22 So we'll go ahead -- let me ask: Counsel, is there
23 anything we need to address before we excuse the jury?

24 MR. O'CONNOR: Nothing from us.

10:21:40 25 MR. ROGERS: Nothing from the defendant, Your Honor.

10:21:42 1 THE COURT: Okay. So we'll excuse you. I'll be
2 back in just a minute to talk with you.

3 (The jury exited the courtroom at 10:21.)

4 THE COURT: All right. Are there any other matters
10:22:08 5 we need to address, Counsel, before we adjourn?

6 MR. LOPEZ: Your Honor, this is just in followup to
7 our discussions we had yesterday about the bellwether
8 process, settlement, things like that. I had an overnight to
9 think about some of the comments you made. I don't want to
10:22:26 10 address them now but I would like to have the opportunity to
11 file papers with you regarding that.

12 THE COURT: Which issue?

13 MR. LOPEZ: The issue of -- you made some comments
14 yesterday about, you know, whether a different venue with
10:22:41 15 different rulings on some of the evidence -- and basically if
16 we're going to keep trying these cases without Recovery
17 deaths and without -- the *Cisson* ruling on FDA evidence,
18 these are going to be tough cases. I mean, the only case
19 that probably has a chance right now is the *Tinlin* case.

10:23:06 20 I mean, it's an uphill battle based on -- and I'm
21 not criticizing your rulings, I'm just saying we're -- that's
22 what we have in this case.

23 And I will say heretofore in state courts, other
24 federal courts, that the Recovery death evidence has come in.
10:23:28 25 *Cisson* is fairly new so we weren't really able to use that

10:23:34 1 but we now have a Fourth Circuit and Eleventh Circuit case
2 restricting FDA evidence that we just can't counter.

3 We're not -- I mean, the Mulkey case is an Eclipse
4 case and, I mean, we tried the best case we could. I don't
10:23:49 5 regret anything we did. This jury found for the defense on
6 the best case we could give under the circumstances. Us

7 having to pretend like the Recovery device did not have the
8 history it had in transitioning to the other devices is

9 always -- is us not really being able to put in front of the

10:24:07 10 jury what the evidence really is. And then for us to have to
11 sit here for the length of this trial with, you know,

12 supposition and all these implications about why the -- that

13 the FDA didn't do anything, we can't counter that. I mean,

14 unless it's a Recovery case with all of that stuff, I just

10:24:27 15 don't think it's going to be possible for us to get a good

16 bellwether picture of what these cases are going to look like

17 if they are tried with some of that evidence in.

18 I'm not suggesting other courts aren't going to do

19 exactly what you did, I'm sure they will, and with the

10:24:48 20 reasoning, but there will be a number of others where that's

21 not going to happen.

22 Unless C.R. Bard knows what's going to happen under

23 those circumstances, the bellwether process is going to serve

24 no purpose. It's just going to be a string of, you know,

10:25:00 25 what we've had the last two trials except -- that's why I

10:25:04 1 want Tinlin to be next. That's the only thing that's going
2 to encourage C.R. Bard, the defendants, to think that they
3 might have a problem and to settle these cases. Or if we can
4 expedite getting some of these other cases to trial.

10:25:18 5 The cases where -- the Delaware -- we had a case in
6 Delaware where the judge took out basically the FDA evidence,
7 Recovery deaths. Of course that was a Recovery case. But
8 that case settled.

9 Mrs. Tinlin deserves an opportunity to have her case
10 be in the same position as other Recovery cases. And for me
11 to ask this woman who's -- I hope she makes it healthwise to
12 May.

13 But, anyway, I want to be able -- I'm a little
14 emotional right now, obviously, Your Honor, about this
15 verdict. I want to be able to give you a better historical
16 perspective about this case from the beginning and why delay
17 is not going to serve anyone's purpose except C.R. Bard's and
18 not really do anything for the plaintiffs.

19 THE COURT: Mr. Lopez, you absolutely can file that
10:26:06 20 memorandum, and defendants can respond.

21 I would ask you to do that sooner rather than later
22 because your arguments, if accepted, would affect what we're
23 doing in February and we all need to know that sooner rather
24 than later. So don't wait three or four weeks to do this.

10:26:24 25 If you can, get it filed as soon as possible.

1 Whenever it's filed, if defendants can respond
2 within a week, I'll be happy to look at those issues. And if
3 I think we need to, we'll get you on the phone and we can
4 talk about it.

5 MR. LOPEZ: Appreciate it, Your Honor. Thank you.

6 THE COURT: Thank you all.

7 ALL: Thank you, Your Honor.

8 (End of transcript.)

9 * * * * *

C E R T I F I C A T E

I, PATRICIA LYONS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control, and to the best of my ability.

DATED at Phoenix, Arizona, this 6th day of October, 2018.

s/ Patricia Lyons, RMR, CRR
Official Court Reporter